SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 280

■

ROSCO JONES, *Petitioner*

v.

CITY OF OPELIKA, *Respondent*

■

On Certiorari to the
Supreme Court of the State of Alabama

PETITIONER'S REPLY BRIEF

JOSEPH F. RUTHERFORD
HAYDEN COVINGTON
Attorneys for Petitioner

INDEX

Subject Index

Cases Cited

Statute Cited

Miscellaneous Citations

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MAY IT PLEASE THE COURT:

Respondent manifestly has fallen into the same pit of error as did the trial court and the Alabama Supreme Court when considering the issues involved as a result of an unsuccessful attempt to jump the broad gap between—

a) police power authorizing taxation, license and regulation of sale of ordinary articles of merchandise upon the streets or from house to house, and

b) the occupation or activity of distributing on streets or at homes of the people literature containing information and opinion (simultaneously inviting and accepting money contributions to aid such work), protected by the Constitution against all sorts of State encroachment.

This gap between the two cannot be bridged or leaped over by law.

Respondent's entire brief is based upon the false premise that there is no distinction between "selling" *literature* and selling ordinary articles of merchandise.

It is also based on the assumption that the license tax here is one of the ordinary forms of taxation for support of government, when, as a matter of fact, the ordinance, on its face and as construed and applied, constitutes and is a *direct burden through license tax* upon circulation and distribution—the very life of "freedom of the press".

Such underlying false premises invalidate respondent's argument as a whole. Thereby this Court is relieved of the need to weigh the contentions and distinctions stressed in respondent's brief.

In all fairness to this Court, and in the interest of aiding the Court to protect the people of this land from every subtle assault against civil liberties such as that made in respondent's brief under the guise of protecting the power of government tax, we submit the following:

Respondent's Technicalities

Jurisdiction of this Court is questioned *again*, and *erroneously*, by respondent. Brief, pages 2, 5, 7-15.

It is extremely difficult to understand how respondent can seriously say that the judgment of the Alabama Supreme Court is not a final judgment. That contention of respondent is contradicted by the record, the history of the case, and the authorities heretofore presented by petitioner.[1]

Respondent cites and quotes from *Box* v. *Metropolitan Life Ins. Co.*, 168 So. 217 (Respondent's Brief, page 14), and argues that the case was sent back to the Alabama Court of Appeals for consideration of other assignments of error. This is not true, and the face of the judgment and record does not support respondent.

In the Alabama Court of Appeals, by brief and argu-

[1] See petitioner's brief in reply to respondent's brief in opposition to the petition for a writ of certiorari, dealing exclusively with this question. See, also, Clark v. Williard, 292 U. S. 112, 118; Mower v. Fletcher, 114 U. S. 127.

ment, appellant urged only two points supported by two specifications of error. These points are identical with the ones urged here. No other specifications or assignments of error were considered by the Court of Appeals. Therefore under the Alabama procedure the highest and intermediate appellate courts cannot consider assignments of error not briefed.[2] Assignments of error not briefed are specifically waived.[3]

We submit that had the Alabama Supreme Court concluded that the other assignments of error were required to be considered by the Court of Appeals, it would have said so expressly, as it did in the *Box* case, supra. The question of jurisdiction in this case is controlled and governed by *Clark* v. *Williard*, 292 U. S. 112, 118. The judgment and opinion of the Alabama Supreme Court terminated the litigation between the parties on the merits of the case "so that if there should be an affirmance [in the Supreme Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Georgia Ry. & Power Co.* v. *Decatur*, 262 U. S. 432, 437.

On the strength of the Alabama Supreme Court's decision in the case at bar, the Alabama Court of Appeals affirmed the conviction of Thelma Jones, wife of petitioner, in a companion case where the assignments of error and the facts were identical. See *Thelma Jones* v. *City of Opelika*, 3 So. 2d 923. Thus it is apparent that the judgment in the instant case was considered a final judgment.

Because respondent is either blind to the law governing the question of what constitutes a "final judgment", or

[2] Rule 10, Alabama Supreme Court Rules (1940 Code of Alabama, Title 7, pages 1008, 1009); Barfield v. Bartlett, 23 Ala. App. 9, 119 So. 696; Jones v. Stollenwerck, 218 Ala. 637, 640, 119 So. 844; Conway v. Robinson, 216 Ala. 495, 497; 113 So. 531; East Pratt Coal Co. v. Jones, 16 Ala. App. 130, 131, 75 So. 722, certiorari denied, Ex parte East Pratt Coal Co., 200 Ala. 697, 76 So. 995.

[3] Louisville Ry. Co. v. Holland, 173 Ala. 675, 682 (point 7), 55 So. 1001; Vernon v. Wedgworth, 148 Ala. 490, 494 (point 4), 42 So. 749; Harper v. Raisen Fertilizer Co., 148 Ala. 360, 363 (point 4), 42 So. 550; Western Union Tel. Co. v. Emerson, 14 Ala. App. 247, 249-250 (point 1), 69 So. 335; Hamilton v. Cofield, 220 Ala. 44, 124 So. 91.

is not serious, we answer the argument without further discussion, by saying, now we are more certain and confident than before certiorari was granted, that the judgment of the Alabama Supreme Court is final and that this Court has jurisdiction.

Regardless of the dilemma in which respondent discovers itself, its tenacious efforts to cut this Court off from considering the merits, by arguing this point, should be rejected as frivolous and without merit.

Merits

Naïvely respondent asserts that it cannot be said that petitioner is an ordained minister preaching the gospel, and that it was not solely because he thus preached that he was prosecuted.

Respondent's narrow-gauge, restricted view of what constitutes an "ordained minister" and "preaching the gospel" prevents respondent from discerning the import of the findings of the court below. (Respondent's brief, page 18.)

The Alabama Supreme Court and the Alabama Court of Appeals found that petitioner was an ordained minister preaching publicly on the streets by distribution of pamphlets setting "forth the gospel of the Kingdom of God as he believes and preaches it". R. 3-4, 62.

The basis for the conviction, according to the State Supreme Court, was that "he cried 'Two copies for five cents'." (R. 6)

In the trial court respondent admitted that petitioner was an ordained minister and engaged in preaching the gospel on the occasion in question. (R. 54)

In this Court the respondent's position on this question has been shifted.

Such change has taken place because it is respondent's private opinion that petitioner's challenged activity is "commercial" merely because it is unlike or does not conform to that commonly recognized and practiced by religious clergymen.

As long as the act of worship by an inhabitant of this land—be he a clergyman, or this petitioner, or any other person—does not infringe the law of morals or the right of property of others, the judiciary or any administrative agency is precluded from invading the field of opinion and right practice to say that a given activity is not in fact an act of worship, or "preaching the gospel".

To "preach" means to proclaim a message.

"Preaching the gospel of the kingdom of God" means proclaiming to others the Scriptural truths of and concerning Jehovah God and His kingdom, The Theocracy, under Christ Jesus.

To be *ordained* thus to minister or serve merely means to be appointed, by the proper authority, to a position or office to perform duties specifically assigned. Jehovah's witnesses being selected by Almighty God, JEHOVAH, it follows that Jehovah is the authority who ordains the servant or minister, as it is written at Isaiah 42:1; Isaiah 43:10-12; Isaiah 61:1-3; John 15:16. Those and other Scriptures clearly state the commission of authority given by Almighty God through His Son Christ Jesus to persons on earth who are servants, or ministers, of Jehovah.

Since Jehovah's witnesses operate in a legal and orderly way through their corporate representative the Watchtower Society, they also possess an earthly ordination.

The courts below wrongly justified respondent's invasion of petitioner's right, by holding that "a preacher" must pay a license tax when he elects to preach by disseminating printed information on the streets and simultaneously receives money contributions to carry forward such work.

Respondent's argument, in effect, interprets *privately* (i. e., for respondent's *purpose* rather than for the purpose of the Teacher, Christ Jesus) the language of the Lord Jesus—'Render to Caesar things that are his, and to God things which are His' (Matthew 22:21)—to mean that a minister under contract with *the Creator* can be required to violate that contract and his conscience by conforming

to the will of *a creature* (i. e., the State) through asking for and obtaining a license before performing acts which *the Creator* in His written Word commands His ministers to do. Because this direct burden violates God's law it cannot be properly deemed one of the demands of "Caesar" to be complied with. *Private* misinterpretation of the Scriptures is 'wresting the Word of God' (2 Peter 3:16); for "no prophecy of the scripture is of any private interpretation". —2 Peter 1:20.

By recording the course of action of His faithful ministers (Hebrews, chapter 11, and other Scriptures), Almighty God has made manifest His interpretation, i. e., the true construction of the Master's words (Matthew 22:21) concerning the obligation of all persons of good-will toward Almighty God with respect to conflicting illegal and wrongful demands of "Caesar". The rule followed by every sincere servant of Jehovah and of Christ Jesus is that such servant willingly and joyfully conducts himself in an upright manner, obeying every law of the land which is not in conflict with JEHOVAH'S law, which is supreme, eternal. This position is exactly like that approved by Blackstone and Cooley. See Blackstone *Commentaries* (Chase, 3d ed.), pages 5-7; Cooley, *Constitutional Limitations*, 8th ed., page 968. As to human demands that conflict with the Creator's perfect commandments to His ministers, the God-given rule is that announced by Jesus Christ's apostle Peter: "We ought to obey God rather than men." "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." —Acts 5:29; Acts 4:19.

Requiring any minister of Almighty God to pay a tax before he preaches by disseminating God's message in printed form (and simultaneously receives money contributions to aid such work) conflicts directly with the law of Almighty God, as well as with the Federal Constitution, because it is a *direct burden*.

Respondent admitted that the clergy of all denominations in Opelika distributed literature when carrying on

religious work and simultaneously received money contributions for such work, and were not required to pay the license tax and none had been prosecuted for failure to pay. (R. 52)

Although "agents" selling or otherwise distributing Bibles are specifically excepted by the ordinance, it is noticed that neither clergymen nor ministers of the Word of God are named in the ordinance.

Can Invasion of the Right Be Justified?

The remaining question is whether or not such invasion is justified under the exceptions allowed by this Court in *Watson* v. *Jones,* 80 U. S. 679, 728. No such exceptions appear in this record. Therefore the State Supreme Court had no authority to invade petitioner's rights by applying this ordinance.

Respondent, the trial court and the Alabama Supreme Court wrongly contend that petitioner was engaged in a *commercial* activity. Not only is there no evidence to support such contention, but it is in total disregard of existing evidence that petitioner was preaching the gospel, and "did not *sell*" (R. 47-50), i. e., did not act for a *commercial* objective, did not aim to acquire pecuniary gain for himself as in conducting a trade or business enterprise.

Wholly *incidental* to petitioner's main activity of preaching the gospel is his taking of money contributions. Other courts have specifically found that the taking of money contributions is entirely *incidental,* collateral, to the main purpose of preaching the gospel of God's kingdom, THE THEOCRACY. See

Donley v. City of Colorado Springs
40 F. Supp. 15
Zimmermann et al. v. Village of London (Ohio)
38 F. Supp. 582
State [S. Car.] v. Meredith
15 S. E. 2d 678

Cantwell v. Connecticut
310 U. S. 296

Semansky v. Stark
199 So. 129

Thomas v. Atlanta
1 S. E. 2d 598

Cincinnati v. Mosier
22 N. E. 2d 418

State of Iowa v. Mead et al.
300 N. W. 523

In each of the cases just cited the activity involved was that of Jehovah's witnesses.

Cases relied on by respondent in justifying the decision below involved general taxes and licenses affecting the gross proceeds of newspaper business, which tax and licensing provisions were not directed at, or a direct burden on, distribution of literature, or calculated on the basis of circulation; but which were entirely incidental and collateral thereto.

Here the license tax throws the burden on the distributor and is a direct encumbrance upon circulation.

The holding in Cole [Lois Bowden et al.] v. Fort Smith, Ark. (151 S. W. 2d 1000; *certiorari denied*, 62 S. Ct. 99) is erroneous, unsound and unconstitutional. Such "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

United States v. Carver
260 U. S. 482, 490

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.
240 U. S. 251, 258

Ohio ex rel. Seney v. Swift & Co.
260 U. S. 146, 151

Atlantic Coast Line R. Co. v. Powe
283 U. S. 401, 403

The license tax here cannot be distinguished from the type of law requiring a permit from a police chief or other authorized official in whom is vested discretion to grant or refuse the permit. This character of law is admittedly unconstitutional. See *Lovell* v. *Griffin*, 303 U. S. 444, and *Schneider* v. *State*, 308 U. S. 147. The same prohibitive result or evil can be and is reached under the license tax law here through increasing the license fee so as to make it impossible for all, except the ultrarich, to exercise constitutional rights guaranteed to everyone. Thus the right of liberty and freedom secured to all by the Constitution would become the prerogative of the wealthy.

Indeed, one might be too poor to pay even the smallest possible license fee that may be fixed, and thus, by reason of his poverty, be refused the rights guaranteed him under the Constitution. The exercise of rights so vital to the maintenance of democratic principles is not and cannot be made dependent upon one's ability to raise sufficient funds wherewith to pay a license-tax fee as a condition precedent to the exercise thereof. To thus hold might and would deprive large segments of the population of the guarantee of their freedom. The results would be a substantial dissolution of the rights of the people and a serious impairment of equality of the inhabitants of this land, and would make indigence a basis for restricting freedom of civil rights.

The ordinance questioned here permits the people, in the exercise of their constitutional rights, to be divided into two classes: one class with worldly riches free to exercise the right of freedom of press and worship according to the dictates of conscience, and another class that is poverty-stricken to the point of being unable to purchase the required license to exercise their vital rights. Thus the ordinance is at war with the Constitution and is a short-sighted blow at the security of the people's liberties.

Laws which make unlawful the bringing of indigents into a state are unconstitutional and void. See *Edwards* v. *California*, 62 S. Ct. 164, 166-170. The principle announced

in that case makes such, by analogy, authority for the petitioner here.

Like "Free Commerce"

The license-tax here applied to the exercise of an admitted constitutional right can be likened to the various kinds of taxes that have been knocked down as being unconstitutional burdens upon interstate commerce.

Petitioner does not and can not rely upon the interstate commerce clause itself. However, by analogy, petitioner's exercise of his rights of "free press" and "worship" is entitled to *equal protection* against any direct-tax burden, even as the right of "free commerce between the states".

This Court has held to be bad taxes and license fees constituting a direct burden against interstate commerce. Such cases, by analogy, show that a similar tax, which directly burdens the exercise of freedom of press and worship, is likewise bad.

This Court has declared in numerous cases that license-tax laws and peddlers' license ordinances similar to the one here involved are unconstitutional when construed and applied to cover peddlers or agents selling from house to house or on the streets merchandise shipped from another state. See *Sabine Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 494-496; *Caldwell et al.* v. *North Carolina*, 187 U. S. 622, 624-632; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510-513; *Dozier* v. *Alabama*, 218 U. S. 124, 126-128, and *Real Silk Hosiery Mills* v. *City of Portland et al.*, 268 U. S. 325, 335-336.

In these trying hours this Court will be equally as hasty and astute to protect the rights under the "Bill of Rights" and the Fourteenth Amendment to the Constitution as it is in sustaining the commerce clause, especially when human rights are threatened, as here, with destruction by the direct burdening of circulation and distribution, the very life of "free press".

Respondent contends that because petitioner refused to apply for a license he is estopped from questioning the constitutionality of the ordinance as construed and applied to him.

The courts of Alabama did not urge this technicality and proceeded to discuss and decide the constitutionality of the ordinance as construed and applied. Therefore it is too late to urge the doctrine of *Smith* v. *Cahoon*, 283 U. S. 553, 562, which was not relied on in the court below. Since the court below decided the constitutionality of the ordinance as construed and applied, it is the duty of this Court to decide the same. This same argument of respondent was urged by the State in *Schneider* v. *State*, 308 U. S. 147, and was brushed aside by this Court.

Certainly this honorable Court would not hold that a person is required to first violate the law of Almighty God and his own conscience by applying for a permit to do what Almighty God commands him to do and this he must do before he could question the validity of the ordinance under which he is arrested.

The very act of applying for a permit to engage in the service or worship of Almighty God, as petitioner was doing in this case, would cause him to violate his conscience and to violate the specific command of the Creator to 'preach this gospel of the kingdom' from house to house and on the public ways; and certainly it is not within the power of the state or courts to compel one to violate his conscience or violate the supreme law as a condition precedent to raising the question of the validity of an ordinance on appeal or certiorari petition to this Court.

Conclusion

Although many courts have enthusiastically followed this Court's *Lovell* v. *Griffin* doctrine, there have been, as here, studied refusals to be bound.

Therefore, despite the clearly definitive nature of ex-

positions by this Court during the past decade of individual activities it deems within the scope of the constitutional protection for freedom of worship, speech, and press, apparently an even more unmistakable expression of its views on this peculiarly *American* issue is a public necessity—to aid lower courts to discern the ample measure of protection the Fourteenth Amendment affords.

To that end your petitioner humbly suggests that his rights, here awaiting final consideration and definition, this Court can well afford to weigh and scrutinize, in historical perspective, from the broad vantage point of calmer days than these of 1942: See Shattuck, "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property'" (Cambridge, 1890), 4 Harv. L. Rev. 365-392; and Warren, "The New 'Liberty' Under the Fourteenth Amendment" (Washington, 1926), 39 Harv. L. Rev. 431.

HAYDEN C. COVINGTON

Attorney for Petitioner